

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

No. 75-4046

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and THE UNITED STATES OF AMERICA,
Respondents,

AERONAUTICAL RADIO, INC., et al.,
Intervenors.

On Petition to Review
An Order of the Federal Communications Commission

STATEMENT OF POSITION IN LIEU OF BRIEF
FOR INTERVENORS AERONAUTICAL RADIO, INC.,
AND AIR TRANSPORT ASSOCIATION OF AMERICA

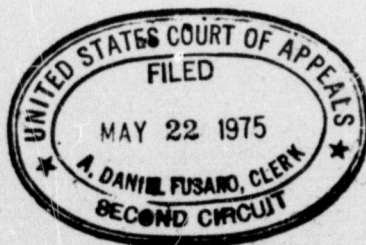
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May 21, 1975

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Pursuant to the suggestion of the Court looking toward a limitation of the number of briefs to be filed by the multiplicity of parties in this proceeding, the intervenors Aeronautical Radio, Inc. (ARINC) and Air Transport Association of America (ATA) adopt generally the brief of the Federal Communications Commission (the Commission), and submit this statement of position in lieu of filing a brief.

INTEREST OF ATA AND ARINC IN THIS PROCEEDING

ATA is an unincorporated non-profit association comprised of common carrier members constituting virtually all of the United States flag lines authorized and required under certificates of the Civil Aeronautics Board to provide regularly scheduled air transport over established routes. As a principal objective, ATA is engaged in the promotion and development of foreign and domestic commerce of the United States, the postal service, and the national defense.

ARINC is the communications company of the air transport industry providing a variety of communications services to all sectors of the industry. In providing these services, ARINC operates its own air-ground and point-to-point radio facilities and leases from AT&T and other carriers a vast network of private line services, in order to promote safety and provide and improve services to the public.

The airline industry represented by ATA and ARINC is a substantial user of communications, and the largest user of private line service in the private sector, second only to the United States Government among all users. Through various proceedings, the proper level of private line rates, particularly TELPAK, a bulk communications service extensively relied upon by the airline industry, has been in litigation since 1961 (in 1964, it was found that TELPAK C and D, the larger groups of circuits, were justified by competitive

necessity, ^{1/} but litigation before the Commission has gone forward whether the level of rates is compensatory to the carrier). During this extensive period of unresolved litigation, TELPAK rates have more than doubled. The rate increases authorized under investigation in the Commission's Memorandum Opinion and Order under review constitute a substantial fourth round of rate increases during a period when the propriety of the earlier three rounds of rate increases has never been determined.

STATEMENT OF POSITION OF ATA AND ARINC

1. Throughout these proceedings, ATA and ARINC have taken no position on the proper over-all rate of return for AT&T and the Bell System.
2. ATA and ARINC do take the position, as more fully set forth in its petitions to reject, secure the withdrawal, or suspend the rate increases, and order an accounting, as set forth in the Joint Appendix, pages 120-136, 190-258, that it was unlawful for the Commission to permit the fourth "pancaking" of TELPAK rate increases, as well as

^{1/} TELPAK Case, Docket No. 14251, 38 F.C.C. 370 (1964), 37 F.C.C. 1111 (1964), reconsideration denied, 38 F.C.C. 761 (1964), affirmed sub nom. American Trucking Associations v. FCC, 126 U.S.App.D.C. 236, 377 F.2d 121 (1966), certiorari denied, 386 U.S. 943 (1967).

other private line rate increases, without any determination of the propriety of any of the earlier rate increases, or even the original level of TELPAK rates, and in the absence of a determination of the appropriate rate making principles and factors in litigation since 1965.

3. There is pending before the Commission a petition by ARINC and ATA for reconsideration of the Commission's order here under review insofar as the order permitted the rate increases to go into effect without an accounting. Every one of the earlier increases in TELPAK rates was permitted to go into effect only after a suspension and under accounting orders pursuant to Section 204 of the Communications Act of 1934, as amended, 47 U.S.C. §2⁴, accounting orders which have never been expressly resolved or set aside to this day. Nevertheless, the Commission has permitted the further rate increases to go into effect without a suspension and without an accounting order. If this failure to place the higher rate increases under an accounting order does not operate to make moot the earlier accounting orders, it at least most seriously jeopardizes and prejudices any possibility of a fair and objective evaluation of the propriety of the earlier, lower levels of rates which are the subject of many volumes of exhibits and testimony in unresolved proceedings. As Circuit Judge George T. Washington observed, concurring in Texaco, Inc. v. FTC,^{2/} "Once an adjudicator has taken a
^{2/} 119 U.S.App.D.C. 366, 376, 336 F.2d 754, 764 (1964), remanded on other grounds, 381 U.S. 739 (1965).

position apparently inconsistent with an ability to judge the facts fairly, subsequent protestations of open-mindedness on his part cannot restore a presumption of impartiality." Clearly, in refusing to order an accounting on higher rates during the period when lower rates were under an investigatory accounting, the Commission has "in some measure adjudged the facts * * * of a particular case in advance of hearing it." ^{3/}

4. In the pending petition for reconsideration, ARINC and ATA also urge that the Commission violated Section 203(b) of the Communications Act and Section 61.58 of its own Rules and Regulations in permitting AT&T to file substantial rate increases for private line services on one day's "notice", without actual effective notice to the public, and without good cause shown in curtailing so drastically the 30 days' statutory notice period.

5. ATA and ARINC urge that this Court express no position, and take no action, which would prejudice the proper

^{3/} Ibid.

resolution of these issues pending before the Commission for reconsideration.

Respectfully submitted,

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May 21, 1975

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AMERICAN TELEPHONE AND TELEGRAPH COMPANY,)	
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<u>Petitioner,</u>)	
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v.)	Case No. 75-4046
	:	
THE FEDERAL COMMUNICATIONS COMMISSION and)	
THE UNITED STATES OF AMERICA,	:	
)	
<u>Respondent,</u>	:	
)	
AERONAUTICAL RADIO, INC., et al.,	:	
)	
<u>Intervenors.</u>	:	

CERTIFICATE OF SERVICE

I, Herbert E. Forrest, a member of the Bar of this Court, hereby certify that copies of the foregoing "Statement of Position in Lieu of Brief for Intervenors Aeronautical Radio, Inc., and Air Transport Association of America", in Case No. 75-4046 were served by depositing the same in the United States mails, postage prepaid this 21st day of May, 1975, upon the following:

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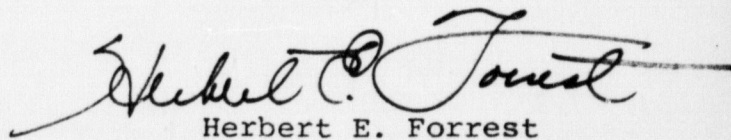
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